IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. Criminal Appeal No.370/2001

Kalyan S/o Genda ...Accused-Appellant
Versus
State of Rajasthan ...Respondent

Date of Judgment ::: March 9,2006

Present
Hon'ble Mr. Justice Narendra Kumar Jain

Shri Biri Singh Sinsinwar with
Shri Harendra Singh Sinsinwar and
Shri M.P. Khandelwal for accused-appellant
Shri B.S. Chhaba, P.P., for the State

By the Court:-

This appeal, on behalf of accused Kalyan S/o Genda, under Section 374 (2), Cr.P.C., is directed against the judgment and order dated 31.5.2001 passed by the Special Judge (N.D.P.S. Cases), Jhalawar, in Sessions Case No.20/2000, whereby the accused-appellant was convicted under Section 8/18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'the Act') and sentenced to ten years rigorous imprisonment and a fine of Rs.1,00,000/-; in default of payment of fine, to further undergo one year's additional rigorous imprisonment.

Briefly stated the facts of the case are that

PW-4 Narendra Singh Meena, Deputy Superintendent of Police, lodged a First Information Report, on 9.8.2000, at Police Station Ghatoli, District Jhalawar, wherein it was alleged that when he was on patrol duty he saw one person, who, on seeing the police jeep, tried to run away. Thereafter that person was caught hold and it was founded that he was carrying one plastic bag and he suspected him. Thereafter two independent witnesses were called and it was apprised to the accused that he will be searched and there will be an option for him to get his search done either before Magistrate or before Gazetted Officer. On search, the contraband opium weighing 3 kg. and 750 gram was recovered from his possession. The accused was arrested. Out of said contraband opium, two samples of 50 gram each were taken and sealed. The remaining contraband opium weighing 3 kg. 650 gram was separately sealed. The contraband seized and accused, were handed over to the S.H.O. The S.H.O. registered the F.I.R. and started investigation in the case. After completion of investigation, a charge-sheet was filed against the accused. The trial court framed charge against the accused for the offence under Section 8/18 of the Act, who denied the charge and claimed to be tried. The

prosecution examined 11 witnesses and produced documents Exhibit P-1 to Exhibit P-16. Thereafter statement of accused under Section 313, Cr.P.C. was recorded. No evidence was adduced in defence.

The learned trial court, after hearing both the parties, convicted and sentenced the accused-appellant, as mentioned above.

The learned counsel for the accused-appellant contended that the search and seizure in the present case was made by PW-4 Narendra Singh Meena, Deputy Superintendent of Police, who was not authorised by the State Government under Section 42 of the Act. He referred the Notification No.F.1(3)FD/EX/85-1, dated 16.10.1986, wherein all Inspectors of Police and Sub Inspectors of Police posted as Station House Officer, were empowered to exercise the powers mentioned in Section 42 of the Act.

He further contended that as per Section 50 (1) of the Act the accused should have been taken to the nearest Gazetted Officer of any of the Departments mentioned in Section 42 or to the nearest Magistrate and the Gazetted Officer or the Magistrate, before whom any such person is brought, shall, if he sees no reasonable ground for search, forthwith discharge the

person but otherwise shall direct that search be made. He contended that in the present case the Gazetted Officer Dr. Vishnu Prasad was called at the spot, therefore, it is contrary to the provisions of Section 50 (1) of the Act.

He further contended that the contraband in the present case was not produced in the court and as such this is an illegality and recovery of contraband cannot be said to be proved only on the basis of recovery memo etc., particularly when there was no independent witness in the present case. He also contended that seal used by PW-4 Narendra Singh Meena, Deputy Superintendent of Police, was not sealed at the spot and the same was not sent to Forensic Science Laboratory (for short, 'FSL') along with the sample. He also contended that there is variance in weigh of the sample seized and sent to FSL. The weigh of sample seized was 50 gram whereas, as per Exhibit P-16 the FSL Report, the weigh of the sample sent to FSL was 51.370 gram.

The learned Public Prosecutor contended that this is a case where the contraband was recovered at public place, therefore, this is a case of Section 43 of the Act and, as such, the provisions of Section 50

of the Act are not attracted in this case. He further contended that a search in the present case was made by Gazetted Officer acting under Section 41 of the Act, hence the provisions of Section 42 of the Act are not attracted. He also contended that the provisions of Sections 55 and 57 are not mandatory in nature, therefore, even if there is some irregularity in respect of seal then the same is not fatal to the prosecution case. He further contended that the learned trial court was right in convicting and sentencing the accused.

I have considered the rival submissions and minutely scanned the impugned judgment and the record of the trial court.

So far as the first contention of the learned counsel for the accused-appellant about search and seizure by unauthorised person i.e. Deputy Superintendent of Police is concerned, I find that there is a proviso to Notification dated 16.10.1986, referred by accused appellant, wherein it is provided that when power is exercised by Police Officer other than Police Inspector posted as S.H.O. of the area concerned, such officer shall immediately hand over the person arrested and articles seized to the concerned

Police Inspector posted as S.H.O. of the Police Station concerned. From the evidence available on the record including the F.I.R. it is clear that although the seizure of the contraband and arrest of the accused was made by the Deputy Superintendent of Police Narendra Singh Meena (PW-4) but he immediately handed-over the contraband article as well as the accused to S.H.O. and in these circumstances I find that there is no force in the contention of the learned counsel for the accused-appellant that the search and seizure was made by unauthorised person. The present case is covered by proviso to Notification S.O.115 dated 16.10.1986.

Another contention of the learned counsel for the accused-appellant that it was a duty of the Circle Officer Narendra Singh Meena (PW-4) to take the accused to the Gazetted Officer or Magistrate, instead of calling the Gazetted Officer at the spot, I find that even if PW-7 Dr. Vishnu Prasad was called at the spot then it does not prejudice the case of the prosecution in any manner. PW-7 Vishnu Prasad was examined in the present case and he supported the prosecution case. The another contention of the learned counsel for the accused-appellant about variance in weigh of sample, seized and sent to the FSL, I find that in the FSL

Report (Exhibit P-16), the net weigh of sample 51.370 gram has been mentioned along with polythene pouch and the cigarette case, therefore, variance is because of polythene bag and it has been explained by the prosecution.

Other submission of the learned counsel for the accused-appellant about non-production of material evidence/case property is concerned, I am of the view that for the purpose of proving the possession of the contraband of the accused and the recovery thereof from him, could have been proved by producing the contraband article itself in the court but in case the prosecution proves it from other cogent evidence of the possession of the contraband of the accused and recovery thereof from him and the prosecution evidence is trustworthy in this regard then merely only on the basis that case property has not been produced in the court to prove the possession and recovery of the contraband from the accused, is not sufficient to acquit the accused.

In the present case I find that the possession of the contraband of the accused is proved from the statement of PW-1 Abdul Rashid, PW-4 Narendra Singh Meena, PW-5 Rajendra Singh, PW-7 Dr. Vishnu Prasad and PW-8 Mohan Lal. The possession and recovery

of contraband from the accused is also proved from the documentary evidence Exhibit P-2 (Recovery Memo), Exhibit P-4 (Letter of S.H.O. forwarding the sealed packet to the FSL), Exhibit P-5 (Letter of S.P. forwarding the sealed packet to the FSL) and Exhibit P-9A, Maal-khana Register. The contraband was opium poppy having 7.03% morphine, is proved from Exhibit P-16, the FSL Report. The evidence of the prosecution, as referred above, proved the possession and recovery of contraband with the accused and I do not see any material contradictions in the above referred oral and documentary evidence so as to discard it.

So far as compliance of the provisions of Sections 55 and 57 of the Act is concerned, it is sufficient to mention that the Hon'ble Supreme Court in Babu Bhai Vs. State of Gujarat, 2005 (7) Supreme 691, has already held that these provisions are only directory and not mandatory.

The learned trial court has considered the oral and documentary evidence in detail and rightly recorded its finding that prosecution has proved guilt against the accused beyond all reasonable doubts. I have also examined the finding of the trial court in reference to submission of learned counsel for the

appellant and I do not find any reason to interfere in it. The learned trial court has rightly convicted the accused appellant.

In view of the above discussion I do not find any force in any of the contentions of the learned counsel for the accused-appellant and the appeal is accordingly dismissed.

(Narendra Kumar Jain) J.

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